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No. 240

In the

Supreme Court of the United States

OCTOBER TERM, 1953

CARROLL VOCATIONAL INSTITUTE,
L. L. COWART AND H. M. ATWOOD,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Jurisdiction	2
Opinions Below	2-3
Questions Presented	2-3
Statute Involved	4
Statement	4-8
Specification of Errors to be Urged	8-14
Reasons Relied Upon for Granting the Writ:	
1. The court below decided important questions of federal law which have not been, but should be, settled by this court	14-18
2. The court below has decided a federal question of law in conflict with the applicable decisions of this court and has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision	18-25
3. The decision below is cited as the controlling authority by the Court of Appeals, in another Circuit, and, is, therefore, misleading as an authority	25
Appendix	27-28

SEP 16 1957

235311

Page

59 A. L. R. 809 19

Barlow v. Jones, 87 Atlantic 649 21

Benson v. Markoe, 37 Minn. 30 20

Campbell v. United States, 48 F. Sup. 398 23

Fletcher v. Veterans Administration, 103 Fed. Sup. 654 14

G. T. Fogle & Co. v. United States, 135 Fed. 2d 117 24

German Savings Bank v. Geneser, 116 Iowa 119 21

Grant Marble Co. v. Abbot, 124 N. W. 264 20

Hurst v. National Bond and Investment Co., 117 So. 792 (Florida Sup. Ct.) 20

Lynch v. United States, 292 U. S. 571 23

Perry v. United States, 294 U. S. 330 ..... 22, 24

Priebe & Son v. United States, 332 U. S. 407 22

Reading Steel Casting Co. v. United States, 268 U. S. 186 21

Slocum v. Gray, 82 Fed. Sup. 125 14

Snauffer v. Stimson, 155 Fed. 2d 861 14

Steimeyer v. Schraeppel, 266 Ill. 9 20

Tayloe v. Riggs, 7 L. Ed. 271 21

United States v. Bank of Metropolis, 10 L. Ed. 774 22

United States v. Robinson, 103 Fed. 2d 713, 715 ..... 13, 14

Van Horn v. Hines, 122 Fed. 2d 207 14

Williston on Contracts, Vol. 5, Sec. 1580 21

Page

Statutes and Miscellaneous

Section 131, Title 38, U. S. C. 2, 3, 4, 8, 9, 11, 12, 13, 14, 17, 27

Section 133, Title 38, U. S. C. 4, 6, 8, 14, 17, 27, 28

Section 696j, Title 38, U. S. C. (Same as Section 1200, P. L. 346) 15

Section 980, Title 38, U. S. C. 16, 17

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Carroll Vocational Institute, L. L. Cowart and H. M. Atwood, partners, respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on March

31, 1954, which affirmed a judgment of the United States District Court for the western district of Louisiana granting the respondent's request for the issuance of a subpoena to produce records.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C., paragraph 1254 (1).

The opinion of the Court of Appeals for the Fifth Circuit was filed March 31, 1954. Petitioners filed application in that Court to recall the mandate issued June 3, 1954, pending the filing of this petition for certiorari. Counsel for Respondent have agreed to await the decision of this Court before proceeding further.

OPINIONS BELOW

The opinion of the District Court is printed in the record (R. 42, 43). It is not reported. The opinion of the Court of Appeals appears in *211 F. 2d 539* and is also printed in the record (R. 56).

QUESTIONS PRESENTED

The questions presented by this petition are:

1. Whether Section 131 of Title 38 U. S. C. A. is applicable to matters involving veteran's education arising under the Servicemen's Readjustment Act of 1944, Section 1500, 38 U. S. C. A., Section 697; Veterans' Regulation No. 1(a), 38 U. S. C. A., following Section 745.

2. Whether jurisdiction of the Veterans Administration, under Section 131, Article 38, U. S. C. A., applies to parties under contract with the Veterans Administration.

3. Whether the subpoena power of the Veterans Administration, under Section 131, of Title 38, U. S. C. A., extends to and is applicable to parties under contract with the Veterans Administration who are not veterans and by reason thereof not beneficiaries or intended recipients of the gratuities and benefits administered by the Veterans Administration to eligible veterans.

4. Whether the subpoena authority conferred under Section 131, of Title 38, U. S. C. A., may be exercised by the Veterans Administration retroactively, after a contract has been terminated and wholly executed, in the absence of a showing of fraud and misrepresentation.

5. Whether the Veterans Administration, as a party to a contract, through use of the subpoena power provided to it under Section 131, Article 38, U. S. C. A., may reform a contract unilaterally after it is fully executed and terminated, in the absence of fraud or misrepresentation.

6. Whether persons or institutions under contract with the Veterans Administration to train veterans under the Servicemen's Readjustment Act of 1944, Section 1500, 38 U. S. C. A., Section 697; Veterans' Regulation No. 1(a), 38 U. S. C. A., following Section 745, are entitled to the protection of the Fifth Amendment to the Constitution of the United States.

STATUTE INVOLVED

Section 131 and Section 133 of Title 38, United States Code, are set forth in the appendix.

STATEMENT

This appeal involves the construction of Section 131 of Title 38, U. S. C. A.

The cause was tried on the pleadings and exhibits in the court below. The Trial Court granted the relief sought by applicant, and the Court of Appeals affirmed that judgment.

October 31, 1952, subpoenas were issued by the Veterans Administration directing Carroll Vocational Institute, L. L. Cowart, Director of the school, and H. M. Atwood, managing partner of said school, to produce certain records for inspection by auditors of the Veterans Administration at Monroe, Louisiana, on November 17, 1952. The records pertained to the operation of the school, including a demand for supporting information pertaining to cost data furnished by the school for the negotiation of tuition rates in certain contracts entered into between the school and the Veterans Administration; contracts covering the periods July 1, 1948, to June 30, 1949, and July 1, 1949, to June 30, 1950, respectively. The principal business of the school was the training of veterans pursuant to Public Law 346, 78th Congress. (38 U. S. C. A., Sec. 701, et seq.) The institution ceased to train veterans December 2, 1952.

Prior to the date set for the hearing, Petitioner H. M. Atwood fully explained his attitude, by letter, to the manager of the Veterans Administration with respect to the subpoena. (R., p. 28.) Petitioner Atwood did not refuse to attend the meeting for which he was subpoenaed, instead he informed the manager that he had theretofore tendered to an auditor of the Veterans Administration such books and records as were available, or to which he considered him entitled to review with respect to charges made by the institution for tools and/or books furnished veteran trainees as well as information concerning the procurement and purchase of consumable supplies used by veteran trainees. He further advised the manager that all records the institution had concerning the use of consumable supplies by or for students, instructors or other parties, or persons or private projects, had been tendered to the auditor previously and that the institution had previously made available to the auditor all records of the institution concerning attendance of veterans. (R., p. 29.) On the day appointed the auditors were advised by the Petitioner L. L. Cowart that the subpoena would be honored, except with respect to certain reservations explained to the auditor by the Petitioner. (R., p. 28.)

Petitioners objected to an attempt to re-negotiate the contracts of 1949 in 1952, after the contract involved had terminated. Likewise, Petitioners objected to a unilateral determination being made by the Veterans Administration in 1952 or at any time after the contract was entered into. Petitioners contend the subpoena is being improperly used.

On January 5, 1953, the assistance of the court in the enforcement of the subpoena was requested pursuant to Section 133, Title 38, U. S. C. A.

By court order dated January 5, 1953, the Petitioners were directed to comply with the subpoena by U. S. District Judge Ben C. Dawkins. (R., p. 21.)

Petitioner Atwood, in propria persona, moved to dismiss the government's complaint on January 21, 1953. (R., p. 23.) By order dated January 24, 1953, the court's prior order directing compliance with the subpoena was stayed pending a hearing on Petitioners' motion to dismiss. (R., p. 41.) The hearing was set down for February 13, 1953.

On the above date attorneys for the parties met with the court, the views of both parties were presented to the court and the court suggested that the parties meet and endeavor to stipulate as much as possible. The parties met but the Veterans Administration was unable to agree with Petitioners on all points in dispute between the parties. Whereupon tentative agreements were abandoned and counsel for both parties, by leave of the court, filed briefs. Thereupon, on May 18, 1953, the court filed its opinion in the nature of an order granting complaint and for judgment, granting to the complainant its request. (R., p. 43.)

The Petitioner institution entered into contractual relationship with the Veterans Administration to train veterans and be paid therefor. Negotiated Contract VA66r-ve-86, with respect to inspection of records of the institution, provided only that the institution keep copies of the train-

ing program, adequate progress records of each trainee, report on the conduct and progress of training and situations indicating need for attention to the veteran and his problem. (R., p. 32.) Negotiated Contract VA66r-vr-89, covering the period October 1, 1947, through June 30, 1948, provided for inspection of receipts signed by the veteran for books, supplies and equipment issued to the veteran and charged to the Veterans Administration. (R., p. 33.) Negotiated Contract V3066V-75 (July 1, 1948, to June 30, 1949) contained provisions requiring the institution, specifically, to keep daily attendance records, excuses for absences, receipts for books, supplies and/or equipment and supporting invoices reflecting costs of books, supplies, tools and/or equipment. (R., pp. 33-35.) Negotiated Contract V3066V-76 covered the same period of time and contained the same provisions. Negotiated Contract V3060V-186 (July 1, 1949, through June 30, 1950) provides the institution will permit inspection of daily records of attendance, absences, receipts for books and tools, invoices on cost of books, etc., records on supplies used in projects. (R., pp. 35-37.) Negotiated Contract V4060V-296 (July 1, 1950, to July 30, 1951) provides for inspection of virtually the same items as in the prior contract. (R., pp. 37-39.) Petitioners have tendered all data required by contract.

No contract between the parties provided for complete book and record inspection by the Veterans Administration. No such contract makes provision for re-negotiation, nor for cost data comparisons directed at re-negotiation or unilateral re-determination. The institution at all times

has been willing to provide the information required under the provisions of the several contracts and has never denied inspection of the records so designated.

All contracts between Petitioners and the Veterans Administration were terminated, fully performed and wholly executed when the instant problem first arose. Use of the subpoena power was not invoked during the life of either contract.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred as follows:

1. On the first five questions—

(A) In holding that Sections 131-133, Title 38, United States Code is applicable to the provisions of Public Law 346, which grants educational benefits to veterans, in as much as it is an amendment to Public Law 2, 73rd Congress (38 U. S. C., Section 701, et seq.), and to Veterans Regulation 1(a) (38 U. S. C., ch. 12, p. 699, et seq.).

(B) That the Petitioners (appellants) concede that the provisions of Public Law 2 are within the scope of the subpoena authority of Section 131, Title 38, U. S. C.

(C) That the provisions for educational benefits, as an amendment, to Public Law 2, and Veterans Regulations 1(a), are likewise within the scope of the subpoena authority.

(D) That Section 1500 of Public Law 346, 78th Congress (38 U. S. C., Section 697), as originally enacted,

which provided that the administrative, definitive and penal provisions under Public Law 2, 73rd Congress, as amended, should be for application under the Servicemen's Readjustment Act, is support for the view that the provisions of Public Law 346 are likewise within the scope of the subpoena authority, stating that the provisions for such educational benefits are an amendment to Public Law 2 and Veterans Regulations 1(a).

(E) That Section 131 of Title 38 is an administrative provision under Public Law 2, and the provisions of Section 131 are for application under the Servicemen's Readjustment Act, Section 701 (f), et seq., of Title 38, United States Code.

(F) That the position, previously stated, is further supported by H. R. Report 1418, May 5, 1944, on S. 1767, where the provisions which later became Section 1500 of Public Law 346 were explained to be for the purpose of integrating the provisions of the Servicemen's Readjustment Act with a system of laws and regulations based upon Public Law 2, 73rd Congress, and to provide uniform administration thereunder.

(G) That the subpoena authority of the Veterans Administration is to be exercised in all matters in which the administration has jurisdiction, and that jurisdiction is the power of that particular agency to administer and enforce the law, and that the Veterans Administration has jurisdiction in this instance with the right to examine the records of Petitioners in order to check the accuracy of the

cause data upon which tuition rates were based. This authority is determined without regard to the fact that the time has passed for the checking of cost data if there ever was a time when the Veterans Administration had, within its "jurisdiction," the power to subpoena and examine records; this authority has been determined to exist with the Veterans Administration notwithstanding the fact that the Government is a party to the contract.

(H) That the subpoenas were issued to ascertain certain facts and that such is not an adjudication or an attempt to reform a contract. If the purpose is not to reform a contract by determining a new tuition rate after the contract is performed and terminated it then is an open question as to the purpose for which the subpoena is sought. If this is not an adjudication or an attempt to make a unilateral determination there seems little purpose or basis for even asking for subpoena. The Veterans Administration seeks subpoena power without a judicial proceeding where all parties may be heard in open court on the basis of facts.

(I) That Petitioners would be found entitled to their day in court if it is brought to light that fraud, or any other misconduct has been practiced. Respondents have neither alleged any facts of fraud, or any other misconduct, practiced by Petitioners and no fraud, other misconduct or misrepresentation of fact was presented in evidence in the trial court. In the absence of a proper allegation and any proof thereon the court does injury to Petitioners by suggesting that "if it should be brought to light" they will be further entitled to their day in court. On the basis of the

record it is not proper for the court to consider any possible wrong doing on the part of the Petitioners but should, on the other hand, indulge every reasonable presumption of fairness in their favor and take into consideration the fact that the negotiations between the parties occurred in 1949 and that the subpoena was an after thought arising late in 1952 long after the contracts involved had terminated by their own provisions.

(J) That in view of the legislation and regulations thereunder, the court is of the opinion that the subpoena authority of the Administrator of Veterans Affairs, under Section 131, Title 38, United States Code, applies to matters involving veterans' education arising under the Servicemen's Readjustment Act of 1934, 38 United States Code, Section 701(f). This notwithstanding the fact that the legislation limits the specific use of the subpoena power and the regulations under the legislation do not even refer to it.

(K) In holding Section 131, Title 38, United States Code to be within the "jurisdiction" of the Veterans Administration, and "jurisdiction" made applicable to a contract for the training of veterans by a third party, and said third party thereby subjected to the subpoena authority of the Veterans Administration.

(L) In holding that the subpoena issued herein applied to a matter within the jurisdiction of the Veterans Administration.

(M) In holding the Administrator of Veterans Affairs has the duty of investigating and determining the true cost data, where the party being investigated is not a veteran seeking benefits, but a contracting third party, and after the contract involved is terminated, fully executed and has been wholly performed.

(N) In holding that the duty of the Administrator of Veteran Affairs in taking "all administrative steps to recoup" overpayments, made under contract, may invoke the subpoena authority of Section 131, Title 38, United States Code, to subject a contracting party to investigation and unilateral determination, notwithstanding the terms and provisions of the contract between the parties.

(O) In holding that the Administrator of Veterans Affairs has the right to examine the records of appellant in order to check the accuracy of cost data upon which tuition rates were based, where tuition was paid under contract between the Veterans Administration and Appellant institution, and the contracts involved were terminated, fully executed and wholly performed when the subpoena was issued.

(P) In holding that the subpoenas were not issued in an attempt to reform a contract, because the acts of the Administrator, in making any determination resultant from the inspection and investigation, even if the tuition rate is varied by one cent, are not reviewable and the Petitioners have no remedy at law.

(Q) In holding that the subpoena authority exists under Section 131, Title 38, United States Code, because Section 1500 of Public Law 346 (38 United States Code 697), provides that the administrative, definitive, and penal provisions under Public Law 2, 73rd Congress should be for application under the Servicemen's Readjustment Act, and, therefore, applicable to Petitioners, who were under contract with the Veterans Administration, although there is no administrative, definitive or penal question before the court, or reason and basis upon which it would apply if such be true.

2. As to the sixth question:

(A) In failing to hold that the enforcement of the subpoena, not legally provided for, as herein, constitutes unreasonable searches and seizures and is therefore prohibited.

(B) In failing to hold that the relationship between the parties hereto being contractual the contracts involved contained the rights of each, and each party must rely upon such contract.

(C) In failing to hold that a fully executed and terminated contract cannot be reformed unilaterally in the absence of fraud or misrepresentation.

(D) In holding that Petitioners do have redress to any action taken by the administrator if Respondents' requested subpoena is authorized. Redress, if any, would be granted over the authority of many federal decisions. *U. S. v. Rob-*

inson, 103 Fed. 2d 713; Slocumb v. Gray, 82 Fed. Sup. 125; Snauffer v. Stimson, 155 Fed. 2d 861; Van Horn v. Hines, 122 Fed. 2d 207; Fletcher v. Vet. Admin., 103 Fed. Sup. 654.

(E) In failing to hold that when the United States Government enters into a contract with a third party the relationship of the parties is thereafter contractual.

(F) In failing to hold that the Fifth Amendment of the Constitution is here applicable.

REASONS RELIED ON FOR GRANTING THE WRIT

1. The court below has decided important questions of federal law which have not been, but should be, settled by this court.

Authority for the relief sought by respondent must be found in Section 131, Title 38, U. S. C. A., if such exists. Where use of the subpoena power has been entrusted for administrative bodies the power for such use has been specific and defined.

Sections 131 to 133, inclusive, Title 38, U. S. C. A., were enacted June 29, 1936, although similar provisions of the law were contained in R. S. 474-4744 and the Act of July 25, 1882. All former acts applied only to pensions. The 1936 Act is a continuation of the same specific purposes.

The jurisdiction of the Veterans Administration under Sections 131 to 133, Title 38, United States Code, at enactment was pensions, bonuses, and veterans relief. All decisions construing this statute have applied it to veterans

and related it to gratuities extended to veterans. Since 1936, Sections 131 to 133 have been made applicable to other legislation but with clear application. Section 816, Title 38, United States Code as enacted in 1940 and amended in 1946, by express and specific but limited authority, provided that Sections 131-134 of Title 38, "insofar as they are applicable, shall apply to the provisions of this subchapter." This section is under the subchapter 1—National Service Life Insurance. Application to a "subchapter" is limited use.

No provision is contained in Veterans' Regulation No. 1(A) Executive Order 6156, June 6, 1933, as such, which refers to the applicability of Section 131, or its predecessor statute or the subpoena power. Part VII of the Regulation, applicable to disabled veterans, Public Law 16, 78th Congress, was enacted March 24, 1943, ten years subsequent to the original date of the Presidential order. Part VIII of Veterans Regulation 1(A), Public Law 346 (78th Congress), in its original context was enacted June 22, 1944.

No such provisions are contained in Public Law 16, 78th Congress, 1943, Part VII of Veterans' Regulation No. 1(A), which provides rehabilitation and education for disabled veterans.

Section 1200 of Public Law 346 (38 U. S. C. 696j) under Chapter XII—Decisions and Procedures, Title V, provides:

> "The authority to issue subpoenas and provisions for invoking aid of the courts of the United States in case of disobedience thereto, to make investigation, and to administer oaths, as contained in Title III of

> the Act of June 29, 1936 (49 Stat. 2033-34; United States Code, Title 38, Secs. 131-133), shall be applicable in the administration of this title."

In the same section of this title, as contained in United States Code Annotated (Section 696j), the last three words vary, to-wit:

> "of this subchapter."

The Subchapter is No. IV—Unemployment Readjustment Allowances. Unmistakeably the power to subpoena is specific and limited to the particular "Title" or "Subchapter;" it is not general.

The provisions of Public Law 346 applicable to rehabilitation and educational benefits are under Title II—Education of Veterans, Section 400, PART VIII, and not under Title V. This law has been amended several times by Congress but general subpoena authority has never been integrated therein.

Section 980, Title 38, United States Code, Public Law 550, enacted July 16, 1952, provides:

> "The provisions of Sections 101-104, 131-133, 450, 454a, 556a, and 715 this title, and the provisions of Section 12 of Public Law Numbered 144, Seventy-eighth Congress, approved July 13, 1943 (57 Stat. 557), as amended, shall be for application under this subchapter."

Again, the power is specifically limited to "Title" or "Subchapter."

Notably this section is carried under Subchapter II—Educational and Vocational Assistance. Section 980, Public Law 550, of July 16, 1952, provides the only specific application in statute of sections 131-133 to any provision of the law applicable to educational and vocational assistance. This provision does not apply in the manner and to the extent the Court of Appeals finds it to be applicable. A reading of this enactment, which provided for Korean veterans, will reveal a specific limitation to the subpoena authority granted. If this section applied to educational and vocational assistance to veterans without limit its enactment in 1952 would not permit its application to the instant case, to-wit: for application to a contract entered into in 1949.

At no place in all the provisions permitting the subpoena power to be invoked is there specific application to third parties contracting with the Veterans Administration on any grounds or for any purpose that the subpoena is sought in this case. The subpoena in this case was not issued for the purpose of determining any matter within the jurisdiction of the Veterans Administration as a quasi-judicial body. The petition of respondent, with affidavit attached, clearly establishes this as an effort to obtain evidence from a third party with whom the Veterans Administration has entered into a valid contract.

Prior to the opinion rendered by the Court of Appeals in this case on March 31, 1954, insofar as Petitioners can determine, Sections 131 to 133, Title 38, United States Code, had not been made applicable to matters involving veter-

an's education arising under the Servicemen's Readjustment Act of 1944, Section 1500, 38 U. S. C. A., Section 697; Veterans' Regulation No. 1(a), 38 U. S. C. A., following Section 745, by any court above the level of the United States District Court, and in those courts possibly in no more than three instances. This case is the making of new federal law on the application of the subpoena power of a Governmental agency; involved in this case are the rights of persons as well as the power and authority of an administrative body. If the law is as interpreted by the Court of Appeals the power of subpoena has been extended far beyond any concept heretofore indicated by any appellate court on this subject.

If the contractual relationship between these parties is firm, and the Veterans Administration is obligated thereby, as in any other contract, there is no "jurisdiction" as contemplated by the subpoena power, though Petitioners do not admit such power ever applies generally, retained by the government over the institution except as is provided by contract. Such "jurisdiction" would exist without subpoena power. To concede the subpoena power may now be exercised as contended by Respondent, is to admit of an unreconcilable situation. The government should either be a contracting party in fact and conform to that status or act administratively under available law without binding Petitioner to a contract status. Neither party may vary the contract without benefit of court.

2. The court below has decided a federal question of law in conflict with the applicable decisions of this court and

has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Each contract involved herein was terminated by its own terms and has been fully executed. There is a clear line of distinction which exists between the reason given by Respondent, as basis for the subpoena, and an allegation that Petitioners have perpetrated fraud on the Veterans Administration and misrepresented facts upon which the various contracts were "negotiated." No fraud or misrepresentation was proved against Petitioners as basis for the subpoena. Good cause is not the proper basis for such an inquiry; it lacks legal justification and is legally impotent. The burden rests upon Respondent to prove entitlement and this has not been done.

The purpose of the subpoena is to secure evidence upon which the Veterans Administration may determine a new tuition rate. Such would be the result of a determination by the administrator. Any determination on the part of the Administrator with respect to any or all of the contracts executed between Petitioners and the Veterans Administration would constitute an effort to reform such contracts by unilateral action.

The general rule in the United States seems to be that a contract will not be reformed for a unilateral mistake. *(59 A. L. R. 809.)* Courts of equity frequently grant relief from unilateral mistakes by rescission or cancellation of a contract. The contracts between Petitioners and the Veter-

ans Administration having been fully executed there can be no rescission or cancellation. Mistake of only one of the parties to an instrument does not justify a reformation of it so as to impose upon the other party obligations he never intended to assume or to bind him to do or to receive what he never contracted for or contemplated. *Benson v. Markoe, 37 Minn. 30.*

In the case of *Hurst v. National Bond and Investment Co., 117 So. 792 (Florida Sup. Ct.)*, plaintiff alleged the defendant represented to him the vendee had been put in possession of the property covered by the retain-title contract. Actually, defendant had sold the property to a third party prior to his entering into the assignment contract with plaintiff. The court held that fraud had not been sufficiently alleged because there were no allegations that the false representations were knowingly or intentionally made. In the absence of such allegations, plaintiff had no clear remedy at law.

In *Steimeyer v. Schraeppel, 226 Ill. 9*, there was a mistake of some of the parties in adding a column of figures representing the prices of items for the furnishing of which a price had been asked, and the result of which computation was adopted as basis of a bid for the contract under attack. The court held the contract could not, after acceptance of a bid, be made the basis of a suit in equity to cancel such contract. *Grant Marble Co. v. Abbot, 124 N. W. 264.*

This rule is supported by *German Savings Bank v. Geneser, 116 Iowa 119; Barlow v. Jones, 87 Atlantic 649.*

> "The same principle that prohibits recovery of money paid after defendant has changed his position makes it clear that whatever equity there may be in favor of one who has made a unilateral mistake in the formation of a bilateral contract, the effect of it is confined to cases where the transaction is still executory. Therefore, if the parties proceed with a contract under a bid or offer erroneously calculated there can be no relief; and in other cases also a unilateral mistake will not justify rescission of a wholly or partly executed contract." Williston on Contracts, Vol. 5, Sec. 1580.

Tayloe v. Riggs, 7 L. Ed. 271, an old Supreme Court decision, holds that where the parties reduce their contract to writing the obligations and rights of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired if they could be established on uncertain and vague impressions made by a conversation antecedent to the reduction of the agreement. It would be all the more true for the contract to be varied by a law subsequently enacted or by a concept germinated on the part of the Government, after the contract was entered into, which was not imparted to the Petitioners, yet if used could possibly be applied advantageously to the Government but, if so, with detriment to the Petitioners.

In *Reading Steel Casting Co. v. United States, 268 U. S. 186*, Reading contracted to furnish the Government two flywheels and ship them to a certain point; if they did not

meet the Government's specifications the Government was to reject them at a reasonable time. The company completed the work, shipped them to the Government, with rejection following later. The company contended rejection was not in a reasonable time. There the court held even though the Government was a party in contract, the contract would be construed and the rights of the parties determined by the application of the same principles of law as if the contract was between individuals. When the United States with constitutional authority makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. *Perry v. United States, 294 U. S. 330; U. S. v. Bank of Metropolis, 10 L. Ed. 774.* Clearly then, when the United States enters into contract relations, its rights and duties therein are governed by the law applicable to contracts between private individuals. *Lynch v. United States, 292 U. S. 571.*

In the case of *Priebe & Sons v. United States, 332 U. S. 407,* the company contracted to sell food to the Government and agreed to deliver it at such time, after a certain date, as the Government should call for delivery. The contract required the company to have the food inspected and ready for delivery by the date specified and failure thereof would result in liquidated damages. The company failed to have the food inspected by the time specified but did have it inspected prior to delivery. There was no delay or damage.

The question was whether the company was liable for liquidated damages and the court held that it is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law; in applying them the court held the Government could not collect liquidated damages.

In *Campbell v. United States, 48 F. Sup. 398*, the daughter of a deceased soldier brought suit to collect insurance benefits although her father died within 120 days of inductment into service and did not apply for insurance, and had represented himself to be single with no dependents. The court held that since the filing of the opinion in *Lynch v. United States, 292 U. S. 571*, War Risk Insurance policies "are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents" that such policies "are property and create vested rights"; that "no power to curtail the amount of the benefits which Congress contracted to pay was reserved to Congress"; "that no such power could be given by any regulation promulgated by the administrator"; that when the government lawfully becomes a party to such a contract, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals"; that rights arising out of such contracts "are protected by the Fifth Amendment"; and that "the due process clause prohibits the United States from annuling them (such con-

tracts), unless, indeed, the action falls within the federal police power or some other paramount power."

From the great weight of authority, it seems well established that the United States is as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiation had been a state or municipality or a citizen. When the United States, with constitutional authority, makes contracts it has rights and incurs responsibilities similar to those individuals who are parties to such instruments. *Perry v. United States, 294 U. S. 330; G. T. Fogle & Co. v. United States, 135 Fed. 2d 117.*

The United States Government may enforce its contract, and may recover for breach thereof, in a court of competent jurisdiction. If the Government has just cause for an adjudication of the contracts with Petitioners, justice, as well as logic, demand of it an orderly procedure, and at the same time a proceeding in which Petitioners are accorded equal rights and privileges. Under the subpoena process, here sought, the contracting party would be clothed with substantially superior rights, with power to make "determinations" of the effect of law, yet a party in contract; and the Petitioners find themselves possessed of no unusual rights; they are bound to Respondent under the terms and express provisions of each separate contract.

The Veterans Administration by this procedure seeks to achieve its purpose by power of the court without the formality of judicial procedure; without opportunity for a day in court being granted Petitioners in any forum. The contract with Respondent should be as secure to Petitioners as the contract is to Respondent. If the subpoena process would permit an upward revision of rates to be paid Petitioners there would be two sides to the proposal. That is impossible by law. If by judicial sanction Respondent may become a quasi-judicial examiner and judge over the rights of Petitioners, without review, though a party to the contract, there is forever lost the concept of sanctity of contract between parties.

3. The decision below is cited as the controlling authority by the Court of Appeals, in another Circuit, and, is, therefore, misleading as an authority.

The case of *General Trade School, Inc. v. United States* was decided by the Court of Appeals for the Eighth Circuit and has not been reported at this date, however, that case was decided by citation of this case as a controlling authority. Citation of this case as an authority for the use of subpoena power under the Servicemen's Readjustment Act, and particularly in instances of contracting third parties, is misleading as an authority. The court should grant the certiorari.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this court.

Respectfully submitted,

CARROLL VOCATIONAL INSTITUTE,
L. L. COWART AND H. M. ATWOOD,
Petitioners.

By.....

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HAYES AND HARKEY,
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Counsel for Petitioners.

June 26, 1954.

APPENDIX

Section 131, Title 38, United States Code:

"Investigations; issuance of subpoenas for attendance of witnesses and production of records; administration of oaths; witness fees.

"For the purposes of the laws administered by the Veterans' Administration, the Administrator of Veterans' Affairs, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Administration. Any person required by such subpoena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States. June 29, 1936, c. 867, Title III, Sec. 300, Stat. 2033."

Section 133, Title 38, United States Code:

"In case of disobedience to any such subpoena, the aid of any district court of the United States or the Supreme Court of the District of Columbia may be invoked in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which the inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any officer, agent, or employee of any corporation or to any other person, issue an order requiring such corporation or other

person to appear or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof." June 29, 1936, c. 867, Title III, 302, 49 Stat. 2033.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION OF THE COURT Filed: March 31, 1954

No. 14648

CARROLL VOCATIONAL INSTITUTE, L. L. COWART and H. M. ATWOOD, *Appellants,*

versus

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Western District of Louisiana

---

(March 31, 1954.)

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

HOLMES, Circuit Judge: The issue here is the validity of the subpoena power exercised by the Veterans' Administration under Section 131, Title 38, of the United States Code. On October 31, 1952, subpoenas were issued by the Administrator of Veterans' Affairs directing the appellant Carroll Vocational Institute to produce certain records for inspection by auditors of the Veterans' Administration. The requested information pertained to the records of the school, among which was a demand for supporting information relating to cost data furnished by the school for the negotiation of tuition rates in certain contracts entered into

between the appellants and the Veterans' Administration. Since the subpoenas were not honored by the appellants, the assistance of the court in the enforcement of said subpoenas was requested pursuant to Section 133, Title 38, United States Code. The court held that the subpoena authority of the Administrator of Veterans' Affairs, under Section 131 of Title 38, was properly exercised; and directed the appellants to comply with the subpoenas.

The appellants contend that Section 131 does not authorize the issuance of a subpoena for the production of records of training schools, but that such section only refers to an investigation concerning veterans' pensions or bonuses. They also assert that the contracts between the Veterans' Administration and appellants define the rights of each, and particularize the right of inspection by the Veterans' Administration; that if the subpoenas were issued, the information obtained as a result thereof would be used to reform the contracts, irrespective of the appellants' rights; and that the appellants would be without redress if the subpoenas were granted. We do not concur in the arguments advanced by the appellants. An analysis of the history of the applicable legislation and the proper statutory construction will show that Section 131 is appropriate to matters relating to the education of veterans. Section 131 provides that, for the purposes of the laws administered by the Veterans' Administration, the Administrator of Veterans' Affairs shall have the power to issue subpoenas for and compel the attendance of witnesses; to require the production of books, papers, documents, and other evidence; and to make investigations and to examine witnesses upon any matter within the jurisdiction of the administration.

Public Law 346, which grants educational benefits to veterans, is an amendment to Public Law 2, 73rd Congress (38 U. S. C., Sections 701, et seq.), and to Veterans' Regulations 1(a), (38 U. S. C., ch. 12, p. 699, et seq.). The provisions of said Public Law 2 are within the scope of the subpoena authority of Section 131, and the appellants concede this fact. It would follow that the provisions for educational benefits, which are an amendment to said Public Law 2, and Veterans' Regulations 1(a), are likewise within the

scope of the subpoena authority. Support for this view is provided by Section 1500 of Public Law 346, 78th Congress (38 U. S. C., Section 697), as originally enacted, which provided that the administrative, definitive, and penal provisions under Public Law 2, 73rd Congress, as amended, should be for application under the Servicemen's Readjustment Act. Since Section 131 of Title 38 is an administrative provision under said Public Law 2, 73rd Congress, the provisions of said Section 131 are for application under the Servicemen's Readjustment Act, Section 701(f), et seq., of Title 38, United States Code. This position is further supported by H. R. Report No. 1418, May 5, 1944, on S. 1767, where the provisions which later became Section 1500 of Public Law 346 were explained to be for the purpose of integrating the provisions of the Servicemen's Readjustment Act with a system of laws and regulations based upon Public Law 2, 73rd Congress, and to provide uniform administration thereunder.

The subpoena statute clearly provides that the subpoena authority of the Veterans' Administration is to be exercised in all matters in which the administration has jurisdiction. Jurisdiction means the right to say and the power to act; and, as between agencies of the government, jurisdiction is the power of that particular agency to administer and enforce the law. United States v. Gilliland, 312 U. S. 86; United States v. Sanders, 42 Fed. Supp. 436; United States v. White, 69 Fed. Supp. 562. It then becomes necessary to ascertain whether or not the subpoena issued here applied to any matter within the jurisdiction of the Veterans' Administration. Public Laws 16 and 346, 78th Congress, provide that the administrator shall have the power and duty to provide and prescribe suitable training for veterans, including entering into contracts with public or private institutions to provide additional training facilities as they may be needed. Pursuant to the authority granted in Public Laws 16 and 346, the administrator has prescribed certain rules and regulations in regard to the training schools for veterans. Some of these regulations require the submission of actual cost data by schools which do not have a customary cost of tuition, provide for a deter-

mination of a fair and reasonable rate of tuition based on actual cost submitted by schools, and require the execution of contracts at rates not in excess of those determined by the Veterans' Administration to be "fair and reasonable." 13 F. R. 2615, et seq.; Sections 21.530, 21.567, and 21.570 of Title 38, Code of Federal Regulations, 1949 Edition. See Metropolitan Training Center v. Gray, 188 F. (2) 28.

It is apparent from the aforesaid legislation and regulations that the administrator of veterans' affairs possesses, in addition to all the usual managerial responsibilities inherent in the administration of a government agency, the particular duties of contracting with schools for the training and education of veterans, including the responsibility of making certain that the tuition rates provided by such contracts are not in excess of what is "fair and reasonable." The ascertainment of what are fair and reasonable rates is predicated upon the accuracy of cost data submitted by schools; and, in an instance of evidence indicating that cost data upon which a contract rate of tuition has been based is not true, the administrator of veterans' affairs has the duty of investigating the matter and determining the true cost data. The administrator's responsibility regarding the disbursements of large amounts of money includes not only the task of ascertaining so far as possible that all amounts disbursed are properly payable, but the responsibility of ascertaining any amounts which have been overpaid in the past, and the taking of all administrative steps to recoup such overpayments. What is primarily in issue is the right of the Veterans' Administration to examine the records of the appellant in order to check the accuracy of the cost data upon which the tuition rate was based. The subpoenas were issued to ascertain such facts; it was not an adjudication or an attempt to reform a contract.

The appellants will be further entitled to their day in court if it should be brought to light that fraud, or any other misconduct, has been practiced. In view of the legislation and regulations thereunder, we are of the opinion that the subpoena authority of the administrator of veterans' affairs, under Section 131, Title 38, United States Code,

applies to matters involving veterans' education arising under the Servicemen's Readjustment Act of 1944, 38 U. S. Code, Section 701(f). Accordingly, the judgment appealed from is

Affirmed.

JUDGMENT

Extract from the Minutes of March 31, 1954.

No. 14648

CARROLL VOCATIONAL INSTITUTE, L. L. COWART and H. M. ATWOOD,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

ORDER DENYING REHEARING

Extract from the Minutes of May 7, 1954.

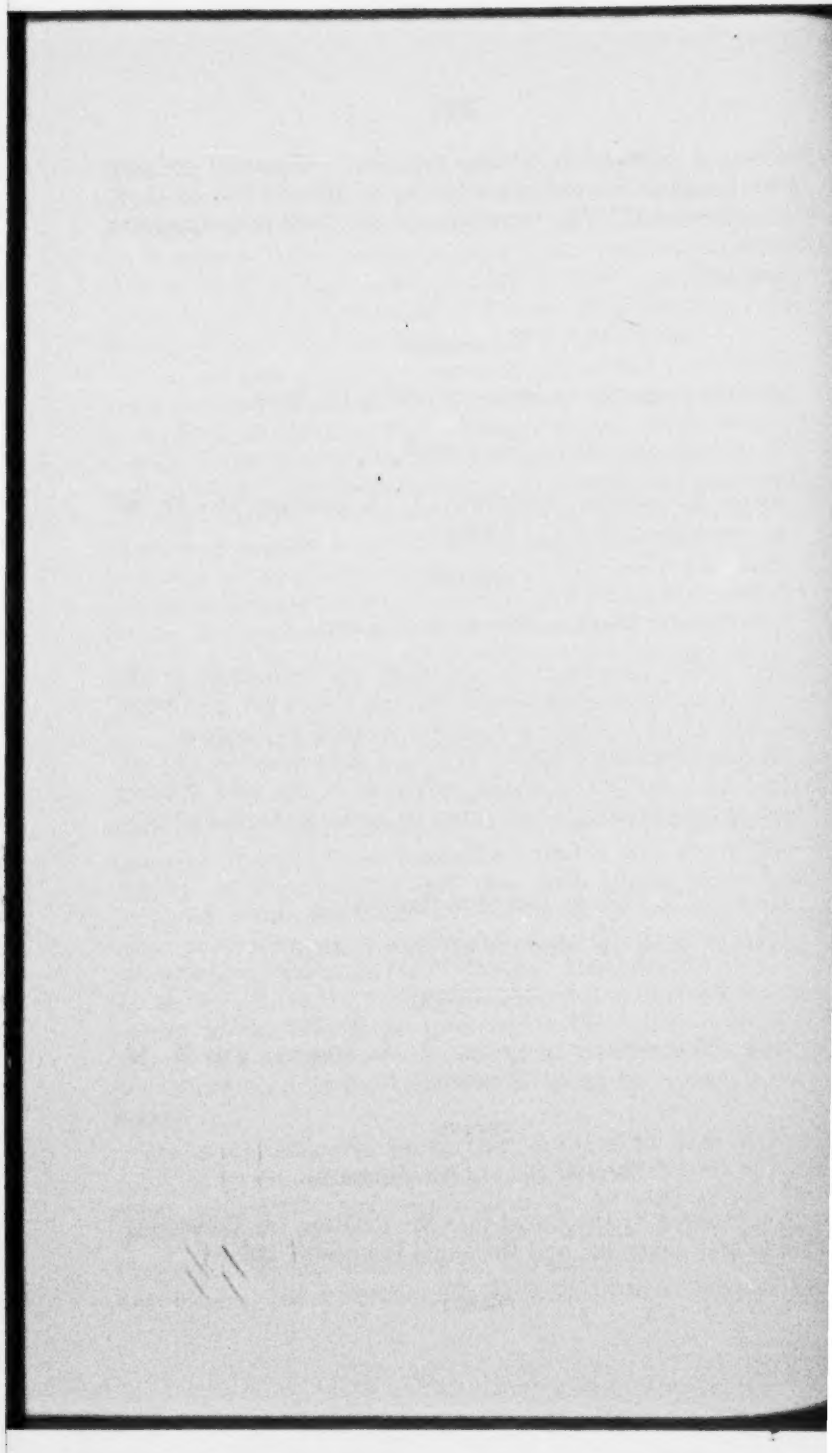
No. 14648

CARROLL VOCATIONAL INSTITUTE, L. L. COWART and H. M. ATWOOD,

versus

UNITED STATES OF AMERICA.

It is ordered by the Court that the Petition for Rehearing filed in this cause be, and the same is hereby, denied.



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HAROLD B. WILLEY, Clerk

No. 240

No. 14,648

In the
United States Court of Appeals
FOR THE FIFTH CIRCUIT

CARROLL VOCATIONAL INSTITUTE, L. L. COWART, and H. M. ATWOOD,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana (Monroe Division)

APPELLANTS' MOTION FOR REHEARING

U. S. COURT OF APPEALS
FILED
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No. 14,648

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

CARROLL VOCATIONAL INSTITUTE, L. L. COWART, and H. M. ATWOOD,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Western District of Louisiana (Monroe Division)

APPELLANTS' MOTION FOR REHEARING

To the Said Honorable Court:

Come Now Carroll Vocational Institute, L. L. Cowart and H. M. Atwood, appellants, in the above numbered and entitled cause, and respectfully move the Court to set aside the judgment of this Court rendered on the 31st day of March, 1954, affirming the Trial Court's judgment, and to grant them a rehearing and reverse said judgment, and in support thereof show the Court as follows:

I.

The Court of Appeals erred in holding that the provisions of Public Law 346 are within the scope of the subpoena authority of Section 131, of Title 38, United States Code.

II.

The Court of Appeals erred in holding that appellants concede the fact that the provisions of Public Law 346 are within the scope of the subpoena authority of Section 131, Title 38, United States Code.

III.

The Court of Appeals erred in holding that the provisions for educational benefits, which are amendatory to Public Law 2, and Veterans' Regulation 1(A), are likewise within the scope of the subpoena authority of Section 131, Title 38, United States Code.

IV.

The Court of Appeals erred in holding that the provisions of Section 1500 of Public Law 346 (38 United States Code, Section 697), as originally enacted, providing that the administrative, definite, and penal provisions under Public Law 2, 73rd Congress, as amended, should be for application under the Servicemen's Readjustment Act, is support to the view that the provisions of Public Law 346 are within the scope of the subpoena authority of Section 131, Title 38, United States Code.

V.

The Court of Appeals erred in holding that the provisions of Section 131, Title 38, United States Code are for application under the Servicemen's Readjustment Act, Section 701(f), et seq. of Title 38, United States Code.

VI.

The Court of Appeals erred in holding that the provisions of Section 131, Title 38, United States Code, are for application under the Servicemen's Readjustment Act, Section 701(f), et seq. of Title 38, United States Code, and, therefore, to be applied in this instant case.

Reference to statutory history is here necessary.

No intent of futile action may be imputed to Congress. Nor may a court favor an interpretation which causes repetition unless such intent of the statutes is clear.

Section 131, Title 38, United States Code, enacted June 29, 1936, provides:

> "For the purposes of the laws administered by the Veterans' Administration, the Administrator of Veterans' Affairs, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the

Administration. Any person required by such subpoena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States."

The jurisdiction at enactment was Pensions, Bonuses, and Veterans' Relief. All decisions construing this statute have applied it to veterans and in relation to gratuities extended them.

Subsequently enacted, in 1940 and amended in 1946, Section 816, Title 38, United States Code, by express and specific but limited authority, provides that the provisions of Sections 131-134, of Title 38, "*insofar as they are applicable, shall apply to the provisions of this subchapter.*" (Italics supplied.)

This section is under the Subchapter 1 — National Service Life Insurance.

No provision is contained in Veterans' Regulation No. 1(A), Executive Order No. 6156, June 6, 1933, as such, which refers to the applicability of Section 131, or its predecessor statute, or the subpoena power. Part VII of the Regulation, applicable to disabled veterans, Public Law 16, 78th Congress, was enacted March 24, 1943, ten years following the original issue date of the presidential order. Part VIII of Veterans' Regulation 1(A), Public Law 346, (78th Congress), in its original context, was enacted June 22, 1944.

No such provisions are contained in Public Law 16, 78th Congress, 1943, Part VII of Veterans' Regulation No. 1(A).

Section 1200 of Public Law 346 (38 United States Code 696j), under Chapter XII — Decisions and Procedures, Title V, provides:

> "The authority to issue subpenas and provisions for invoking aid of the courts of the United States in case of disobedience thereto, to make investigations, and to administer oaths, as contained in Title III of the Act of June 29, 1936 (49 Stat. 2033-34; United States Code, Title 38, Secs. 131-133), shall be applicable in the administration *of this title.*" (Italics supplied.)

In the same section of this title, as contained in United States Code Annotated (Section 696j), the last three words vary, to-wit:

> *"of this subchapter"* (Italics supplied.)

The Subchapter is No. IV—Unemployment Readjustment Allowances.

The provisions of Public Law 346 applicable to rehabilitation and educational benefits are under Title II — Education of Veterans, Section 400, Part VIII, and not under Title V. This law has been amended several times by Congress but general subpoena authority has never been integrated therein.

Section 980, Title 38, United States Code, Public Law 550, enacted July 16, 1952, provides:

> "The provisions of Sections 101-104, 131-133, 450, 454a, 556a, and 715 this title, and the provisions of Section 12 of Public Law Numbered 144, Seventy-

eighth Congress, approved July 13, 1943 (57 Stat. 557), as amended, shall be for application *under this subchapter.*" (Italics supplied.)

Notably this section is carried under Subchapter II—Educational and Vocational Assistance. A reading of this enactment, which provided for Korean veterans, will reveal a specific limitation to the subpoena authority granted.

At no place in all the provisions permitting the subpoena power to be invoked is there specific application to third parties contracting with the Veterans Administration on any grounds or for any purpose that the subpoena is sought in this case.

This specific but limited subpoena authority is wholly inapplicable to the instant case; if applicable it would be retroactive.

VII.

The Court of Appeals erred in holding Section 131, Title 38, United States Code to be within the "jurisdiction" of the Veterans Administration, and "jurisdiction" made applicable to a contract for the training of veterans by a third party, and said third party thereby subjected to the subpoena authority of the Veterans Administration.

VIII.

The Court of Appeals erred in holding that the subpoena issued herein applied to a matter within the jurisdiction of the Veterans Administration.

IX.

The Court of Appeals erred in holding the Administrator of Veterans Affairs has the duty of investigating and determining the true cost data, where the party being investigated is not a veteran seeking benefits, but a contracting third party, and after the contract involved is terminated, fully executed and has been wholly performed.

X.

The Court of Appeals erred in holding that the duty of the Administrator of Veterans Affairs in taking "all administrative steps to recoup" overpayments, made under contract, may invoke the subpoena authority of Section 131, Title 38, United States Code, to subject a contracting party to investigation and unilateral determination, notwithstanding the terms and provisions of the contract between the parties.

XI.

The Court of Appeals erred in holding that the Administrator of Veterans Affairs has the right to examine the records of appellant in order to check the accuracy of cost data upon which tuition rates were based, where tuition was paid under contract between the Veterans Administration and Appellant institution, and the contracts involved were terminated, fully executed and wholly performed when the subpoena was issued.

XII.

The Court of Appeals erred in holding that the subpoenas were not issued in an attempt to reform a contract, because the acts of the Administrator, in making any determination resultant from the inspection and investigation, even if the tuition rate is varied by one cent, are not reviewable and the appellant has no remedy at law.

XIII.

The Court of Appeals erred in holding that appellants "will be further entitled to their day in court if it should be brought to light that fraud, or any other misconduct, has been practiced."

This matter was not initiated by an allegation of fraud. Great injustice accrues to appellants and involves their rights if the court views their rights here with a taint of suspicion and an anticipation of "fraud, or any other misconduct," which is not in the record before the court.

XIV.

The Court of Appeals erred in holding that the subpoena authority exists under Section 131, Title 38, United States Code, because Section 1500 of Public Law 346 (38 United States Code 697), provides that the administrative, definitive, and penal provisions under Public Law 2, 73rd Congress should be for application under the Servicemen's Readjustment Act, and, therefore, applicable to appellants, who were under contract with the Veterans Administra-

tion, although there is no administrative, definitive or penal question before the court, or reason and basis upon which it would apply if such be true.

XV.

The Court of Appeals erred in failing to hold that the Veterans Administration does not have authority under Section 131, Title 38, United States Code, to issue a subpoena requiring parties under contract with it, such contract being to train veterans under World War II Servicemen's Readjustment Act, to produce for inspection and audit all books and records of such parties.

XVI.

The Court of Appeals erred in failing to hold that, even if it be determined that ample authority exists under Chapter 14, Title 38, Sections 977 and 980, United States Code, to issue the subpoena involved herein, to grant it would apply the authority retroactively, therefore authority does not exist for this subpoena.

XVII.

The Court of Appeals erred in failing to hold that the enforcement of a subpoena, not legally provided for, as herein, constitutes unreasonable searches and seizures, and is therefore prohibited.

XVIII.

The Court of Appeals erred in failing to hold that the time had passed for the Veterans Administration to check the cost information in appellants' books and records which was used in the making of a contract terminated and wholly executed on the date the subpoena was requested by the Veterans Administration.

XIX.

The Court of Appeals erred in failing to hold that when the United States Government (Veterans Administration) enters into a contract with a third party the relationship of the parties is thereafter contractual.

XX.

The Court of Appeals erred in failing to hold that, the relationship between the parties hereto being contractual, the contracts involved contained the rights of each, and each party must rely upon such contract.

XXI.

The Court of Appeals erred in failing to hold that a fully executed and terminated contract may not be reformed unilaterally, in the absence of fraud or misrepresentation.

XXII.

The Court of Appeals erred in failing to find that appellants have no redress to any action taken by the administrator if claimants requested subpoena is authorized.

Appellants respectfully pray that this motion be granted and that the judgment of the trial court be in all things reversed, and the relief sought by complainant permanently denied.

A copy hereof was mailed to Warren E. Burger, Assistant Attorney General of the United States, Washington, D. C., and Mason P. Gilfoil, Assistant United States Attorney, Shreveport, Louisiana, Attorneys for Appellee, on the 19th day of April, 1954.

Respectfully submitted,

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	3
Conclusion	9
Appendix	10

CITATIONS

Cases:

Alonzo Locke Memorial Training Institute v. *U. S.*, Civil No. 11808, W. D. Tenn. (1954)	9
Endicott Johnson Corp. v. *Perkins*, 317 U.S. 501	8
General Trades School v. *United States*, 212 F. 2d 656	9
Mississippi Read Supply Co. v. *Walling*, 136 F. 2d 391	8
Nye & Nissen v. *United States*, 168 F. 2d 846, affirmed, 336 U. S. 613	8
Stephan v. *United States*, 319 U.S. 423	6
United States v. *General Trades School*, Civil No. 7902, E.D. Mo. (1954)	9

Statutes:

1 U.S.C. 204(a)	6
18 U.S.C. 1001	8
Servicemen's Readjustment Act of 1944 (Public Law 346):	
Sec. 400(a), 58 Stat. 287, 38 U.S.C. 701(f)	10
Sec. 1500, 58 Stat. 300, 38 U.S.C. 697	5, 6, 10
Act of March 20, 1933 (Public Law No. 2 of 1933), 48 Stat. 8-16, 38 U.S.C. 701 *et seq.*	5
Sec. 7, 48 Stat. 9, 38 U.S.C. 707	7
Act of June 29, 1936 (49 Stat. 2033)	4

Statutes—Continued

Page

Sec. 300, 38 U.S.C. 131..... 4, 5, 6, 7, 11
Sec. 302, 38 U.S.C. 133..... 3, 4, 6, 12
Sec. 303, 38 U.S.C. 134..... 5
Act of July 16, 1952 (Public Law No. 550), Sec. 270, 66 Stat. 681, 38 U.S.C. 980..... 4
Title XIII of the Second War Powers Act, 1942, 56 Stat. 185, 50 U.S.C. App. 643..... 8
World War Veterans' Act of 1924, Sec. 8, 43 Stat. 609, 38 U.S.C. 431..... 5, 7

Miscellaneous:

F.R.C.P. 26, 33, 34..... 8
H. Rep. No. 2899, 74th Cong., 2d Sess. 1-2..... 5
H. Rep. No. 1418, 78th Cong., 2d Sess. 16..... 6
S. Rep. No. 755, 78th Cong., 2d Sess. 14..... 6

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 240

CARROLL VOCATIONAL INSTITUTE, L. L. COWART AND H. M. ATWOOD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Western District of Louisiana (R. 42-43) is unreported. The opinion of the Court of Appeals for the Fifth Circuit (Pet. 29-33) is reported at 211 F. 2d 539.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1954 (Pet. 33). A timely motion for rehearing was denied on May 7, 1954 (Pet.

33). The petition for a writ of certiorari was filed on July 27, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the subpoena power of the Veterans Administration can be used to obtain records relating to the costs of veteran training provided in a private school under the Servicemen's Readjustment Act of 1944.

STATUTES INVOLVED

Sections 400(a) and 1500 of the Servicemen's Readjustment Act of 1944 (58 Stat. 287, 300, 38 U.S.C. 701 (f), 697), and sections 300 and 302 of the Act of June 29, 1936 (49 Stat. 2033, 38 U.S.C. 131, 133) are set forth in the Appendix, *infra*, pp. 10-12.

STATEMENT

On October 31, 1952, the Veterans Administration issued subpoenas to the petitioners directing them to produce certain books and records relating to contracts with the Veterans Administration for veteran training (R. 10-20). The principal business of petitioner Carroll Vocational Institute, a privately-owned school, was the training of veterans under the educational provisions of the Servicemen's Readjustment Act of 1944 (the "G. I. Bill of Rights"); petitioner Atwood was a member of the partnership which owned the school and Cowart was its director (R. 2-3, 25-26). The school had several contracts with the Veterans Administration under which it was to charge for training veterans and receive payment from the Adminis-

tration (R. 25-26). The subpoenas called for specific data pertaining to the formulation and performance of those contracts. Two past contracts were mentioned by number, but the subpoenas were not limited in scope to those agreements, as is shown by the direction to produce data supporting charges under "any and all of its contracts with the Veterans Administration" and attendance records "of all students training in accordance with Public Laws 16/346, 78th Congress * * *." The Veterans Administration strongly suspected that various of the contracts and past payments were procured by false representations (R. 5-9).

Petitioners refused to honor the subpoenas as served, claiming that all materials which the Veterans Administration officials were entitled to see had already been shown them and that the Carroll Institute need not disclose all the data subpoenaed (R. 20, 29). In order to enforce the subpoenas, this action was brought by the United States pursuant to Section 302 of the Act of June 29, 1936, 49 Stat. 2033, 38 U.S.C. 133, *infra*, p. 12 (R. 2*ff*). The order of the District Court for the Western District of Louisiana to comply with the subpoenas was filed on May 26, 1953 (R. 44-46). The Court of Appeals for the Fifth Circuit unanimously affirmed that order on March 31, 1954 (Pet. 29-33).

ARGUMENT

1. The petitioners' major contention is that the Veterans Administration has no authority to issue subpoenas or secure court enforcement in admin-

istering the educational provisions of the Servicemen's Readjustment Act of 1944.[1] It is true, as petitioners assert, that the word "subpoena" does not appear in that portion of the Act, but there is ample statutory authority to issue such orders in other parts of the Act, in the terms of other pertinent acts, and in the history of this and other veterans legislation.

a. Sections 300 and 302 of the Act of June 29, 1936, 38 U.S.C. 131, 133, *infra*, pp. 11-12, are the basic provisions authorizing and providing enforcement for administrative subpoenas in veterans affairs. The language of these provisions is very broad and encompasses the issuance of subpoenas "upon any matter within the jurisdiction of the Administration." Petitioner objects, however, to their application here on the ground that when these provisions were enacted the jurisdiction of the Veterans Administration did not include the educational program of the 1944 Act. But traditional rules of statutory construction would interpret the broad provisions of the 1936 Act, which was designed to make uniform provisions for the administration of all veteran laws, as applicable to later statutes such as the 1944 Act.[2] This would be particularly true here because

[1] It should be noted that the objection to subpoenas can apply only to this particular statute. The power to issue subpoenas and procure court enforcement for the administration of the educational provisions of the Act of July 16, 1952 (Public Law No. 550) ("Korean G. I. Bill") is clear beyond dispute. Sec. 270, 66 Stat. 681, 38 U.S.C. 980.

[2] The "purpose clause" of the 1936 statute expresses an intent "to effect uniform provisions in laws administered by

the 1944 Act is an amendment to a veterans' benefit law existing at the time of the 1936 Act. Act of March 20, 1933 (Public Law No. 2), 48 Stat. 8-16, 38 U.S.C. 701 *et seq.*

b. Moreover, that section of the Servicemen's Readjustment Act of 1944 which provides for the administration of the Act makes specific reference to the application of "administrative" powers available under the original 1933 veterans' benefit law (Public Law No. 2). Sec. 1500, 58 Stat. 300, 38 U.S.C. 697, *infra*, pp. 10-11. Thus, since the subpoena power was available in administering the 1933 Act (by reason of the 1936 Act, *supra*), it is available under the 1944 Act.

Petitioners object to this conclusion on the ground that Section 1500 of the 1944 Act does not incorporate all powers now usable in administering the 1933 Act but only those available when it was originally enacted. This contention is based on the wording of Section 1500 as it appears in Title 38 of the United States Code (38 U.S.C. 697), inserting code section numbers to replace the phrase "under Public, Numbered 2, Seventy-third Congress, as amended * * *" which appears in the section as enacted in 1944. These section numbers

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the Veterans' Administration * * *." 49 Stat. 2031. Section 300 simply broadened earlier subpoena powers to apply to all affairs under the direction of the Administration. Cf. World War Veterans' Act of 1924, Sec. 8, 43 Stat. 609, 38 U.S.C. 431. Accompanying Section 300 of the 1936 Act was a repealer of earlier subpoena provisions. Act of June 29, 1936, Sec. 303, 49 Stat. 2033, 38 U.S.C. 134. See H. Rep. No. 2899, 74th Cong., 2d Sess., pp. 1-2.

do not include 38 U.S.C. 131, 133 (the subpoena provisions, *supra,* p. 4) apparently because the codifiers read "under Public, Numbered 2" to mean "contained in" rather than "available under." However, Title 38 of the United States Code is at most prima facie evidence of the law. 1 U.S.C. 204(a). To the extent that it is inconsistent with the Statutes at Large, it must yield. See *Stephan* v. *United States,* 319 U.S. 423, 426.

A fair reading of Section 1500, as it was enacted (*infra,* pp. 10-11), would include in the 1944 Act all the administrative procedures available in carrying out the provisions of the 1933 Act (Public Law No. 2). Any ambiguity is resolved by the legislative reports leading to the 1944 statute (H. Rep. No. 1418, 78th Cong., 2d Sess., p. 16; see also S. Rep. No. 755, 78th Cong., 2d Sess., p. 14):

> Section 1500 makes applicable except as otherwise prescribed in this act, the administrative, definitive, and penal provisions of Public Law 2, Seventy-third Congress, as amended, and the provisions of Public Law 262, Seventy-fourth Congress, as amended. This is for the purpose of integrating the provisions of this act with a system of laws and veterans' regulations based upon the said Public Law 2 and to provide uniform administration thereunder.

c. Furthermore, the 1933 Act, as originally passed, did provide for subpoena power. That statute specifically incorporated an earlier sub-

poena provision [3] which was later supplanted by the broad language of the 1936 Act (*supra*, p. 4). Public Law No. 2 of 1933, Sec. 7, 48 Stat. 9, 38 U.S.C. 707. In rewording Section 1500 of the 1944 Act, the compilers of Title 38 did not include the code section of the early subpoena provision because it was repealed in 1936. They should, however, have inserted the section number of the provisions of the 1936 Act which replaced it. Consequently, even a narrow reading of Section 1500 of the 1944 Act—limited to the original provisions of Public Law No. 2 of 1933—would include the subpoena power.[4]

2. Petitioners next argue that even if there is a power to subpoena in matters relating to education, the particular information sought here is not "within the jurisdiction of the Administration," as required by the statute. [5] The Administrator has broad responsibilities in supervising payments to educational institutions under the 1944 Act. As the court below pointed out (Pet. 32), his duties may include a determination of "fair and reasonable" costs, and the avoidance of unreasonable payments. In the event of overpayments he must take all available action to recover such sums. The

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[3] 43 Stat. 609, 38 U.S.C. 431. See fn. 2, *supra*, pp. 4-5.

[4] That Congress has occasionally taken the precaution of reiterating the subpoena power in other sections of the 1944 Act, using that word rather than referring to other statutes generally, should not defeat the availability of the power under the education provisions since it is there authorized by express and implied reference to other laws.

[5] 49 Stat. 2033, 38 U.S.C. 131, *infra*, p. 11.

"jurisdiction" of the Veterans Administration clearly extends to investigations of possible fraud or misrepresentation which have led to improper contracts or excessive payments.[6] The petition contends that this is an unauthorized variation from accepted contract principles since it is said to represent reformation for a unilateral mistake. But the Veterans Administration is not now seeking to reform contracts or assuming the role of a court. This is a quest for information, akin to the inquiries frequently launched by other agencies into matters within their respective jurisdictions.[7] The fact that contracts are involved does not bar the Veterans Administration from proceeding here any more than the Labor Department is precluded from investigations under the Public Contracts Act. *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501.[8] Should the investigation produce evidence of

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[6] For a comparable statutory use of "jurisdiction", see 18 U.S.C. 1001; cf. *Nye & Nissen* v. *United States,* 168 F. 2d 846, 850-1 (C.A. 9), affirmed, 336 U.S. 613.

[7] The demand that evidence of fraud be presented as a condition precedent to investigation is without basis. The material sought is specific and relates directly to government expenditures. Cf. F.R.C.P. 26, 33, 34.

Petitioners' contention that the subpoena allows unreasonable search and seizure in violation of what the petition terms rights under the Fifth Amendment (Pet. 3, 13) is equally groundless. The demand was confined to records clearly pertinent to the limited matter under inquiry. Petitioners do not now and never have made any objection to the subpoenas as requiring self-incrimination. Cf. *Mississippi Road Supply Co.* v. *Walling,* 136 F. 2d 391 (C.A. 5).

[8] During World War II, Congress gave broad subpoena power for the investigation of the costs and performance of war contracts. Title XIII of the Second War Powers Act, 1942, 56 Stat. 185, 50 U.S.C. App. 643*ff*.

overpayments it will then be incumbent upon the agency to proceed further in order to recoup those amounts.

3. Since the Servicemen's Readjustment Act was passed in 1944 only three cases, including this one, have arisen challenging the Administration's rights to subpoena educational records. [9] In each case that right was upheld by the district court. In the only other appellate decision on the matter, the Eighth Circuit, after making an independent examination of the statute and its history, reached the same conclusion as the court below. *General Trades School* v. *United States,* 212 F. 2d 656 (C.A. 8). The lower courts are in accord, and there is no need for further review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
SAMUEL D. SLADE,
Attorney.

AUGUST, 1954.

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[9] *United States* v. *Carroll Vocational Institute* (W.D. La., R. 42-43); *United States* v. *General Trades School,* Civil No. 7902, E. D. Mo. (1954); *Alonzo Locke Memorial Training Institute* v. *United States,* Civil No. 11808, W. D. Tenn. (1954).

APPENDIX

1. The Servicemen's Readjustment Act of 1944, 58 Stat. 284, Public Law No. 346, 78th Cong., 2d Sess., provides in part:[10]

Section 400(a) [58 Stat. 287, 38 U.S.C. 701(f)]

Subsection (f) of section 1, title I, Public Law Numbered 2, Seventy-third Congress, added by the Act of March 24, 1943 (Public Law Numbered 16, Seventy-eighth Congress), is hereby amended to read as follows:

"(f) Any person who served in the active military or naval forces on or after September 16, 1940, and prior to the termination of hostilities in the present war, shall be entitled to vocational rehabilitation subject to the provisions and limitations of Veterans Regulation Numbered 1 (a), as amended, part VII, or to education or training subject to the provisions and limitations of part VIII."

Section 1500 [58 Stat. 300, 38 U.S.C. 697]

Except as otherwise provided in this Act, the administrative, definitive, and penal provisions under Public, Numbered 2, Seventy-third Congress, as amended, and the provisions of Public, Numbered 262, Seventy-fourth Congress, as amended (38 U.S.C. 450, 451, 454a and 556a), shall be for application under this Act.

[10] The Act is set forth here in the form in which it was enacted rather than as codified in the United States Code, for the reasons discussed, *supra*, pp. 5-7.

For the purpose of carrying out any of the provisions of Public, Numbered 2, as amended, and this Act, the Administrator shall have authority to accept uncompensated services, and to enter into contracts or agreements with private or public agencies, or persons, for necessary services, including personal services, as he may deem practicable.

2. Act of June 29, 1936, 49 Stat. 2031, provides in part:

Section 300 [49 Stat. 2033, 38 U.S.C. 131] For the purposes of the laws administered by the Veterans' Administration, the Administrator of Veterans' Affairs, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Administration. Any person required by such subpena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States.

Section 302 [49 Stat. 2033, 38 U.S.C. 133]

In case of disobedience to any such subpena, the aid of any district court of the United States or the United States District Court for the District of Columbia may be invoked in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which the inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any officer, agent, or employee of any corporation or to any other person, issue an order requiring such corporation or other person to appear or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 359031 319

INDEX.

	Page
Consent to the filing of this brief	1
The interest of the amici curiae	2
Reasons for granting the writ	2
Conclusion	12
Appendix A—Consent to the filing of this brief	13
Appendix B—Opinion and judgment below	14

CITATIONS.

Cases Cited.

Ellis v. Interstate Commerce Commission (1915), 237 U. S. 434, 59 L. Ed. 1036 5

Fletcher v. Veterans Administration (D. C. Mich., 1952), 103 F. S. 654 11

New York Technical Institute of Maryland, Inc., v. Limburg (D. C. Md., 1949), 87 F. S. 308 11-12

Perry v. United States (1935), 294 U. S. 330, 352, 79 L. Ed. 912 6

Priebe & Sons v. United States (1947), 332 U. S. 407, 411, 92 L. Ed. 32 6

Reeding Steel Casting Co. v. United States (1925), 268 U. S. 186, 188, 69 L. Ed. 907 6

Slocumb v. Gray (D. C. D. C., 1949), 82 F. S. 125 12

Stephan v. United States, 319 U. S. 423, 426 5

Tayloe v. Riggs (1828), 1 Peters 275, 279, 7 L. Ed. 591, 600 6

United States v. Bethlehem Steel Corp. (1942), 315 U. S. 289, 86 L. Ed. 855 10

United States v. Standard Rice Co. (1944), 323 U. S. 106, 110, 89 L. Ed. 104 6

Statutes Cited.

Public Law 245, Chapter 652, 82nd Congress, 1st Session, enacted October 31, 1951, 65 Stat. 700 7
Public Law 550, 82nd Congress, 2nd Session, approved July 16, 1952, 38 U. S. C. 977 8-9
Section 104 (3), Renegotiation Act of 1951, 5 U. S. C. App. 1214 11
Section 131 of Title 38, U. S. C., 49 Stat. 2033, Public Law No. 844, 74th Congress, approved June 29, 1936, C. 869, Title III, Section 300 .....3, 4, 7, 8, 9
Section 267, Public Law 550 9
Section 270, Public Law 550, 38 U. S. C. 980 9
Section 300 of Act of 1936 12
Section 697, Title 34, U. S. C. 5
Section 1200, Title V 4
Section 1500, Public Law 346 5
Servicemen's Readjustment Act of 1944, Public Law 346, 78th Congress, 2nd Session, Chapter 268, approved June 22, 1944 4
Servicemen's Readjustment Act of 1944, Public Law 346, 78th Congress, 58 Stat. 284 2
Title II of Public Law 346 4
Title III, Public Law 844 9
Title V, Public Law 346 4
Title 38, U. S. C., Section 1200 of Public Law 346, Chapter 696 4
War Renegotiation Acts of 1948, 62 Stat. 259, 50 U. S. C. App. 1193, and of 1951, 65 Stat. 7, 50 U. S. C. App. 1211 11

Miscellaneous.

Attorney General's Committee on Administrative Procedure Report, 77th Congress, 1st Session, Senate Document No. 8 (1941), p. 416 3

No. 240.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

CARROLL VOCATIONAL INSTITUTE,
L. L. COWART and H. M. ATWOOD,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF

Of the General Trades School, Inc., and Herman Pagels as Amici Curiae in Support of Petition for Writ of Certiorari.

CONSENT TO THE FILING OF THIS BRIEF.

Consent to the filing of this brief by the General Trades School, Inc., and Herman Pagels as amici curiae was obtained from counsel for both parties in this case. Their telegrams dated September 18th and 20th respectively are printed as Appendix A to this brief.

THE INTEREST OF THE AMICI CURIAE.

The General Trades School, Inc., and Herman Pagels, its president, find themselves in practically the same situation as Petitioners here and are equally interested in the determination by this Court of the scope of the subpoena power of the Veterans' Administration in connection with negotiated contracts under the Servicemen's Readjustment Act of 1944, Public Law 346, 78th Congress, 58 Stat. 284. As in this case, an administrative subpoena was issued against Herman Pagels **after** the appurtenant contracts had terminated and had been fully performed by the School. The U. S. District Court of St. Louis ordered compliance with the subpoena. Its order was sustained by the Eighth Circuit Court of Appeals, which relied upon the decision below as the sole applicable authority in upholding the contention of the Veterans' Administration. The style of that case is **General Trades School, Inc., and Herman Pagels v. United States.** The opinion of the Eighth Circuit, which was rendered on May 11, 1954, is unreported and is printed as Appendix B hereto.

The determination by this Court of the basic issues presented in the petition for certiorari of the **Carroll Vocational Institute et al.**, will affect directly the position of these amici curiae. It is understood that the Veterans' Administration will not proceed further against the General Trades School, Inc., pending the decision of this Court in the present case.

REASONS FOR GRANTING THE WRIT.

The Court below has decided important questions of federal law, which have not been, but should be, settled by this Court. While this Court has repeatedly insisted that the subpoena power of administrative agencies be kept within well-defined channels, in recognition of the dangers

of abuse involved, the precise questions at bar have not been specifically decided by this Court.

The issues present here have great significance because of the number of schools whose contracts have terminated and are now in danger of being reopened through the use of administrative subpoenas under the rule announced by the decision below. Furthermore, the construction of the pertinent statutes involves also the recognition of important principles of general law applicable to administrative agencies.

1. Authority for the subpoena in issue here is claimed to rest on Section 131 of Title 38, U. S. C., 49 Stat. 2033, Public Law No. 844, 74th Congress, approved June 29, 1936, c. 869, Title III, Section 300. At the time that statute was enacted no contractual relationship between the Veterans' Administration and educational institutions was in existence. The Veterans' Administration was concerned exclusively with pensions and similar gratuities from the government. These were the subject matters of the "jurisdiction" of the Veterans' Administration within the meaning and scope of Section 131.

Even in connection with those matters, there was a serious question as to the power of the Veterans' Administration to issue subpoenas. The authoritative Report of the Attorney General's Committee on Administrative Procedure, 77th Congress, 1st Session, Senate Document No. 8 (1941), p. 416, states that the power of the Veterans' Administration to use subpoenas without formal proceeding is "doubtful."

The case at bar does not involve pensions or other unilateral relationships between the Veterans' Administration and recipients of governmental gratuities but a bilateral relationship resting on negotiated contracts. These were entered between the Veterans' Administration and the Carroll Vocational Institute (hereinafter referred to also as

the School), pursuant to the Servicemen's Readjustment Act of 1944, Public Law 346, 78th Congress, 2nd Session, Chapter 268, approved June 22, 1944.

Title II of Public Law 346 is styled "Education of Veterans" and establishes the authority for the program upon which these negotiated contracts rest. The subpoena provisions are contained in **Title V**, Section 1200, which provides that:

> "The authority to issue subpoenas and provisions for invoking aid of the Courts of the United States in case of disobedience thereto, to make investigations, and to administer oaths, as contained in Title III of the Act of June 29, 1936 (49 Stat. 2033-34, U. S. C., Title 38, Secs. 131-133) shall be applicable in the administration **of this title.**" (Our emphasis.)

The title referred to in Section 1200 is Title V and concerns "readjustment allowances for former members of the armed forces who are unemployed." The juxtaposition of the two titles is meaningful. In granting the subpoena power Public Law 346 confined it to situations arising under Title V and did not make it applicable to the field of vocational training which is governed by Title II. The same limitation is carried over in the U. S. C. In Title 38, U. S. C., Section 1200 of Public Law 346 is Section 696; and there the section ends with the word "subchapter" in lieu of "title." The subchapter is styled "Unemployment Readjustment Allowances" which is the equivalent of Title V, Public Law 346 and again cannot be identified with the Chapter concerning Education of Veterans. To construe Section 131 of Title 38, U. S. C., as applicable to all parts of Public Law 346 would do violence to the expressed intention of Congress to circumscribe the subpoena power.

The same conclusion follows from the fact that Section 697 of Title 38, U. S. C., which makes certain general administrative and penal provisions of other laws applicable to Chapter 11 C on World War II Servicemen's Readjust-

ment Benefits, does not include Section 131 in the itemization of the pertinent sections of those laws. *Inclusio unius, exclusio alterius.*

In its brief, respondent concedes the point (pp. 5-6), but argues that the United States Code is only prima facie evidence of the law and that it must yield to the extent that it is inconsistent with the Statutes at Large. No such inconsistency exists here. Section 1500 of Public Law 346 provides that the administrative provisions "under Public, Numbered 2, Seventy-third Congress, as amended • • • shall be for application under this Act."

The subpoena provisions in issue are not contained in Public, Numbered 2, and therefore, no inconsistency exists between Section 1500 of Public Law 346 and Section 697 of Title 34, U. S. C. Clearly, the situation present here is not even remotely comparable to that in **Stephan v. United States**, 319 U. S. 423, 426, quoted by respondent (Brief, p. 6). It should be also considered that the compilers of the Code are further warranted in their interpretation of Section 1500 by the fact that the extraordinary subpoena power which is quasi-judicial in nature cannot be read in a statute by implication but requires a specific statutory enactment.

2. This argument based on the literal construction of the statutes is supported by an equally compelling reason of general law. The decision below failed to recognize the distinction between **regulatory** and **contractual** relationships of administrative agencies. It is important that this differentiation be clarified and sanctioned by a decision of this Court, in line with similar limitations on administrative subpoenas established in such cases as **Ellis v. Interstate Commerce Commission** (1915), 237 U. S. 434, 59 L. Ed. 1036.

The subpoena power is a quasi-judicial function which is entrusted to administrative bodies at an increasing pace

as a means of investigation and enforcement of regulatory powers within their proper field, but does not and cannot encompass those areas in which the governmental agency has been directed by Congress to operate on a contractual basis. Then the contract defines and confines the rights, duties and obligations of the parties, and the contractual provisions cannot be nullified in their letter or spirit by resorting to the regulatory power of the subpoena, absent specific statutory authority.

In the case at bar there is no congressional enactment which makes the Carroll Vocational Institute, or any other school similarly situated, subject to the jurisdiction of the Veterans' Administration ipso facto by operation of law. The School is not the recipient of a government gratuity such as a pensioner or a veteran trainee. The only relationship between the School and the Veterans' Administration is contractual: it originates, rests and ends in negotiated contracts. As Chief Justice Marshall said in **Tayloe v. Riggs** (1828), 1 Peters 275, 279, 7 L. Ed. 591, 600:

> "When parties reduce their contract to writing, the obligations and rights of each are described, and limited by the instrument itself."

Nor is the Government entitled to different treatment, whenever it chooses to enter into a contract, but the same standards apply that govern all other contracting parties. **Priebe & Sons v. United States** (1947), 332 U. S. 407, 411, 92 L. Ed. 32, 38; **United States v. Standard Rice Co.** (1944), 323 U. S. 106, 110, 89 L. Ed. 104; **Perry v. United States** (1935), 294 U. S. 330, 352, 79 L. Ed. 912; **Reeding Steel Casting Co. v. United States** (1925), 268 U. S. 186, 188, 69 L. Ed. 907.

Outside of the contract, the Veterans' Administration would have no authority whatsoever over the School. This the Court below failed to recognize.

Since the contract does not require the School to preserve and make available to the Veterans' Administration the records requested in the subpoena, it follows that no such obligation was incurred by the School upon executing the contract. This conclusion is particularly strengthened by the fact that the contract does require the School to keep certain other designated records and to make them available to the Veterans' Administration (R. 33-39). The positive and express specification in the contract necessarily negatives any broader requirement by implication derived from extracontractual sources. If Section 131 were sufficient authority to require the School to furnish any and all records pertaining or relating to a contract between the School and the Veterans' Administration, what function could be served by the articles of the contract which the agency found it necessary to incorporate therein to require the School to keep and furnish certain designated records? Again *inclusio unius exclusio alterius* is the principle which finds direct application here.

Record keeping requirements as to the items sought by the subpoena could have been—but were not—incorporated in the contracts. The lack of any such contractual provision cannot be substituted, after the contracts have terminated and have been performed by the School, by unilateral resort to the extra-contractual subpoena provisions of Section 131, Title 38, U. S. C.

It is significant that when Congress intended to require certain government contractors to maintain records and make them available to inspection by an administrative agency, it found it necessary to clearly establish those requirements by statute. A pertinent illustration is offered by Title XIII of the Second War Powers Act, referred to by respondent (brief, p. 8, footnote 8). Another significant example is found in Public Law 245, Chapter 652, 82nd Congress, 1st Session, enacted October 31, 1951, 65 Stat. 700, which provides as follows:

"Section 304 of the Federal Property and Administrative Services Act of 1949 and Section 4 of the Armed Services Procurement Act of 1947 are hereby amended by inserting at the end of the above-named sections the following new subsection:

"'(c) All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts.'"

It appears from the above that: (a) statutory authority is necessary to compel a government contractor to maintain and make available its records; and (b) such requirement must be set forth specifically in the contract itself.

Thus, the conclusion is warranted that the basic principles of contract law apply to government contracts, and that they cannot be ignored or detoured, absent specific Congressional authority of the type represented by Public Law 245. No such proscribed result could properly be obtained by stretching the scope of the applicability of Section 131, Title 38, U. S. C.

3. Petitioners' position that Section 131 should not be so construed as to compel independent contractors to produce records outside of the scope of their contract finds further support in the fact that the Veterans' Administration itself felt it necessary to seek and did obtain such specific congressional authority in connection with the Korean war veterans' program. Public Law 550, 82nd Congress, 2nd Session, approved on July 16, 1952, 38

U. S. C. 977, known as the Veterans' Readjustment Assistance Act of 1952, provides in Section 267 that:

> "The records and accounts of educational institutions and training establishments pertaining to eligible veterans who received education or training under this title shall be available for examination by duly authorized representatives of the Government."

This provision should be read in conjunction with Section 270 of the same Public Law 550, 38 U. S. C. 980, which reads in part as follows:

> "The * * * provisions of Titles II and III of Public Law Numbered 844, Seventy-fourth Congress, approved June 29, 1936, as amended, shall be for application under this title."

Title III of Public Law 844 includes Section 131 of Title 38, U. S. C., upon which the subpoena power in issue here is allegedly grounded. Therefore, Public Law 550 specifically confers upon the Veterans' Administration the power to compel the production of the records which Section 267 now requires the schools operating under the Korean veterans' program to keep and have available.

Until July 16, 1952, there was no statutory provision requiring schools to "make available for examination" to the Government their records and accounts "pertaining to" veteran trainees. If the same result could have been obtained previously by the use of the subpoena powers of Section 131, there would have been no purpose served by enacting Section 267 of Public Law 550. No intent of futility can be imputed to Congressional action.

4. The contracts between the Veterans' Administration and the School were "negotiated" contracts, evidencing that the Veterans' Administration had made sufficient inquiry prior thereto as to the pertinent facts and had adequate knowledge for the bargaining which is in-

volved in such "negotiated" transaction, finally crystallized in the written contract. The time has passed for a comparison of cost and other data which were incorporated in rates and charges agreed upon in the contracts with the books and records of the School or with those of similar institutions. The information having been submitted by the contractor to the Veterans' Administration prior to the agency's determination which was part of the "negotiation", all of which occurred before the execution of the instrument, and the contracts involved here being terminated and fully performed, the request of the Veterans' Administration is untimely made.

It is clear that the purpose of the subpoena is to enable the Veterans' Administration to substantiate rates and charges other than the contractual ones. In essence this is an assumption of the right to renegotiate the contract. No such authority is conferred upon the Veterans' Administration by any provision of the contract.

In **United States v. Bethlehem Steel Corp.** (1942), 315 U. S. 289, 86 L. Ed. 855, this Court stated:

> "Under our form of government we do not have the power to nullify it [policy of allowing profits to contractors], as we believe we should necessarily be doing, were we to declare these contracts unenforceable on the ground that profits granted under Congressional authority were too high. The profits made in these and other contracts entered into under the same system may justly arouse indignation. But indignation based on the notions of morality of this or any other court cannot be judicially transmuted into a principle of law of greater force than the express will of Congress.
>
> • • • • • • • •
>
> "But if the Executive is in need of additional laws by which to protect the nation against war profiteer-

ing, the Constitution has given to Congress, not to this Court, the power to make them" (315 U. S., l. c. 308-309).

The power of renegotiating contracts cannot be lightly inferred but must rest on a specific congressional enactment; witness the history of the War Renegotiation Acts of 1948 (62 Stat. 259, 50 U. S. C. App. 1193) and of 1951 (65 Stat. 7, 50 U. S. C. App. 1211). Not only must a statute be the express foundation for renegotiation, but the contract itself must contain an apposite article providing that it is subject to renegotiation as it is specifically provided by Section 104 (3) of the Renegotiation Act of 1951 (5 U. S. C. App. 1214). Thirdly, the actual process of renegotiation is entrusted to an ad hoc Board created by Congress with an established method of review for the contractor.

How could the Veterans' Administration arrogate itself such extraordinary power, in the absence of specific statutory authority?

It is submitted that it was error for the Court below to sanction such an unwarranted assumption of power by the Veterans' Administration, with far-reaching consequences for all other schools and contractors in comparable situations.

5. These consequences are particularly serious in view of the fact that the procedure sanctioned by the court below would deprive petitioners and other schools similarly situated of their day in court on the merits of the case. Whatever determination the Veterans' Administration may make as a result of its subpoena investigation would be final administrative action which under the present authorities is not open to judicial review. **Fletcher v. Veterans' Administration** (D. C. Mich., 1952), 103 F. S. 654; **New York Technical Institute of Maryland v. Lim-**

burg (D. C. Md., 1949), 87 F. S. 308; **Slocumb v. Gray** (D. C. D. C., 1949), 82 F. S. 125.

It follows that unless the Veterans' Administration is required to resort to court proceedings whenever it wants to modify rates or other provisions of the contract, it may achieve unilateral and final redetermination of that contract through the use of the subpoena power.

This final result is even more dangerous because under the ruling below the Veterans' Administration appears free to issue administrative subpoenas without any time limits, irrespective of the fact that the contract has terminated. Since there is no specific statute to govern the situation, there is no time limit within which the subpoena must be issued. The lack of any such time limitation is of further support for the position of these Petitioners, namely, that Congress never intended that Section 300 of the Act of 1936 should apply to contractual situations of the type present here.

CONCLUSION.

For the foregoing reasons and for the arguments advanced by petitioners it is respectfully submitted that the writ of certiorari should be issued.

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Counsel for Amici Curiae.

APPENDIX A.

The Consent of the Parties Hereto to the Filing of This Brief.

The consent of the Carroll Vocational Institute, L. L. Cowart and H. M. Atwood, Petitioners, was given by Allen Melton, their counsel of record, in the following telegram:

"Paul B. Rava, Lashly, Lashly & Miller,
"705 Olive St., St. Louis.

"Will welcome your filing Amicus Curiae in Carroll Vocational case on certiorari. This is permission.

"Allen Melton."

The consent of the United States of America, Respondent, was given by Simon E. Sobeloff, the Solicitor General, in the following teletype:

"Washington, D. C., 9-20-54
"Paul B. Rava, Esq.,
"705 Olive St., St. Louis, Mo.

"Consent is hereby given to your filing amicus brief in number two forty Carroll Vocational Institute et al. versus US.

"Simon E. Sobeloff, Solicitor General."

APPENDIX B.

The Opinion Below.

United States Court of Appeals
For the Eighth Circuit.

No. 14,764.

General Trades School, Inc., a Corporation, and Herman Pagels, Appellants,

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[May 11, 1954.]

Frank P. Motherway for Appellants.

Harry Richards, United States Attorney, W. Francis Murrell, Assistant United States Attorney, and Joseph F. Murphy, Assistant Chief Attorney, Veterans Administration, submitted brief for Appellee.

Before Sanborn, Johnsen and Collet, Circuit Judges.

Johnsen, Circuit Judge.

The question is as to the validity of an administrative subpoena issued by the Administrator of Veterans' Affairs, on which the District Court had ordered a compliance.

General Trades School, Inc., of St. Louis, Missouri, had contracted with the Veterans' Administration to give training in auto body repairing to veterans, under Public Law 346, 78th Cong., 58 Stat. 287. The Administration was to pay a certain charge as tuition, and for necessary books, supplies and equipment "at cost to school, plus 10% for handling."

The school prepared a schedule, which was attached to and made a part of the contract, of "required books, supplies and equipment and approximate price." The schedule, captioned "Tool List," set out 22 items and a price figure for each, with the total estimated cost shown amounting to $56.00.

Statements submitted by the school from time to time were apparently paid by the Veterans' Administration in ordinary course, until the General Accounting Office sent it a communication advising it that a check made by that Office indicated, among other things, that the school had been billing the Administration for tools, "at an average increase over cost of $18.00 per tool kit." The communication also suggested that not only had the school overcharged for the tools as separate items, but that it further had included the cost of them in its consumable supplies and so seemingly had received duplicate payment for them. When the Administration thereafter requested the privilege of examining the school's books and records, the school refused to permit it to do so.

The Administrator of Veterans' Affairs then issued an administrative subpoena, requiring the president of the school to appear and give testimony and to bring with him, for the period that the contract had been in effect, "all records pertaining to the purchase of tools and supplies including invoices, contracts pertaining to the purchase of tools and supplies, and individual folders pertaining to all students who have been in attendance * * * and for which claims have been or will be presented to the U. S. Veterans Administration for tuition, cost of tools and supplies, and any other evidence in your possession bearing on this subject."

The president ignored the administrative subpoena, and the Administrator accordingly made application to the District Court for a compliance order. The application

was resisted by the president and the school, on the grounds that the Administrator had no authority in law to issue any such subpoena and that the subpoena was for other reasons also invalid. The court held that the subpoena was in general valid and entered an order of compliance, requiring the president of the school to appear and give testimony and to produce the files and records requested in relation to "the Veterans Administration investigation to determine the cost of tools, supplies and equipment furnished students under Public Law No. 346, 78th Congress, as amended." The order further made its own specification of the things required to be produced, as consisting of "all records * * * pertaining to the procurement and net prices charged to and paid by said General Trades School, Inc., for tools, supplies and equipment furnished students * * * under Public Law No. 346, 78th Congress, as amended," throughout the contract period, "and more particularly any and all general accounting records, files, folders, correspondence, price lists, records of inventory, physical inventories, records of accounts payable, accounts payable, cash disbursements, cash receipts, cancelled checks and any other evidence in the possession of the said institute bearing on said cost of tools, supplies and equipment furnished by the said General Trades School, Inc."

The principal contention on this appeal, taken by the president and the school, is that the Administrator of Veterans' Affairs has been granted no authority by Congress to issue investigative subpoenas in relation to the educational and vocational-training program for veterans under Public Law 346, 78th Congress, 58 Stat. 287. Such subpoena power as is possessed by the Administrator admittedly rests upon 49 Stat. 2033, 38 U. S. C. A., § 131,[1] which,

[1] "For the purposes of the laws administered by the Veterans' Administration, the Administrator of Veterans' Affairs, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpoenas for and compel the attendance of witnesses within a

among its grants, authorizes the issuing of subpoenas by him "to make investigations and examine witnesses upon any matter within the jurisdiction of the Administration."

It is argued that the word "jurisdiction" in legal use has application to the exercise of judicial or quasi-judicial power only; that the Veterans' Administration has no such power to make adjudications or determinations as to the rights or duties of educational or vocational institutions under existing contracts entered into between the Administrator and such institutions for veteran-training; and that the Administrator therefore was without any authority to issue a subpoena to investigate the cost of the tools and equipment which the school was furnishing under its contract, on the purported basis of the question being a "matter within the jurisdiction of the Administration."

But this concept of "jurisdiction," in relation to the subpoena power under § 131, is one that is both artificial and unrequired. "Jurisdiction" is not always used to connote the exercising of judicial or quasi-judicial power. "It is a term in general use, of comprehensive and large import, having different meanings, dependent on the connection in which it is found and the subject matter to which it is directed," and it is in fact "often used without any determinate signification." 50 C. J. S., pp. 1089, 1090.

And so it has been recognized that a legislative use of the term "jurisdiction," in relation to the functioning of an administrative agency, is not necessarily one of legal technicalness but may be simply a general characterization of the field of powers and duties of that agency in administering or enforcing law. See **United States v. White**, D. C.

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radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Administration. * * *." 38 U. S. C. A., § 131.

S. D. Cal., 69 F. Supp. 562, 564; **United States v. Sanders**, D. C. S. D. Tex., 42 F. Supp. 436, 439. Cf. also **Sanchez v. United States**, 1 Cir., 134 F. 2d 279, 283. The recent case of **Carroll Vocational Institute v. United States**, 5 Cir., ... F. 2d ...., has specifically held that it is in this sense that the word "jurisdiction" was intended to be used in 38 U. S. C. A., § 131. We agree.

The language of § 131 may again be noted, that "For the purposes of the laws administered by the Veterans' Administration, the Administrator * * * shall have the power to issue subpoenas * * * to make investigations * * * upon any matter within the jurisdiction of the Administration." Public Law 346 specifically commits the administration of its educational and training provisions to the Administrator. 58 Stat. 290. He is authorized to make necessary rules and regulations. Ibid. He has the power to approve or disapprove institutions as being qualified to furnish education or training under the Act. Id., p. 289. He is authorized to fix "fair and reasonable compensation" for such education or training, where the institution has no established tuition fee or where its established fee is found by the Administrator to be inadequate compensation. Ibid. He is charged with the obligation and responsibility of making payment for tuition and necessary books, supplies and equipment furnished by the institution. Ibid.

On all of this, it seems to us only a natural statutory construction to view the Administrator's responsibility for the making of proper payments, in disbursing the vast amount of public funds appropriated for the veterans' educational and training program, as reasonably implying some measure of right and duty, if any question arises in his mind, to check the propriety of any statement submitted by such an institution—and even more compellingly so where the charges made are required to rest upon a "cost-plus" basis—and further to regard this implied right and duty to check as necessarily falling within the

facilitating subpoena power of § 131 in relation to the making of investigations "upon any matter within the jurisdiction of the Administration." See again **Carroll Vocational Institute v. United States**, supra, ... F. 2d at page ...

It is further contended, however, that the Administrator is not entitled to issue any subpoena against a school or its officers, because of the express prohibition of Public Law 346 that "No department, agency or officer of the United States, in carrying out the provisions of this part, shall exercise any supervision or control, whatsoever, over * * * any educational or training institution * * *." 38 Stat. 289. This prohibition obviously was intended to assure that there would be no attempt at federal dictation, under the veterans' educational and training program, over any institution, in its courses, standards, policies, processes or other internal affairs. But the mere auditing or verifying, from existing records or data, within relevant and undisrupting bounds, of the correctness of a claim submitted by an educational or training institution for payment by the Administration from public funds, can hardly be called an exercise of federal supervision or control over the institution. It is not an interference with the school's internal affairs and cannot on that ground be held to be outside the power of the Administrator of Veterans' Affairs to make investigation and use the subpoena power in ascertaining whether the institution has submitted proper charges for its training.

Again, it is contended that, even if the Administrator be regarded as having authority in general to issue such a subpoena, a compliance should not be required in the present situation, because the school has requested the Veterans' Education Appeals Board, 64 Stat. 338, 339, to grant it certain relief in its veteran-training relationship. The record and the briefs are not entirely clear as to what the school

is attempting to accomplish by its application to the Appeals Board. As nearly as we can tell, it is apparently asking the Board to declare that it ought, on the basis of the charges made by it to non-veterans, and of general fairness and reasonableness in the contract situation, to be allowed to make a charge to the Veterans' Administration for its course of $442.00 per student. This is the only prayer contained in its application, and we therefore assume that its object is to get the separate tool-charge provision of the contract superseded, if possible, as a matter of enabling it to make a flat charge and thus eliminate any future question on its tool costs. We also take it that the Veterans' Administration has refused to agree to any such modification of the contract. But whatever might be the hopes of the school in making the application, or even the possible outcome thereof, we do not think that this required the District Court, as a matter of law or necessary discretion, to deny or stay the compliance order here and thus delay the Administrator's investigation and ascertainment for administrative purposes of the fact of whether overcharges and duplications of charges for tools had in the past been occurring and been paid for, under the contract as it then and still existed. The Administrator's ascertainment of this fact in relation to his duty and responsibility for the public funds which had been paid out would not deprive the school of its right to a day in court on any fraud or mistake that the Administrator might thereafter contend had existed. Cf. **Carroll Vocational Institute v. United States**, supra, ... F. 2d at page ...

It is also contended that any right which might otherwise exist to examine the records covered by the compliance order is legally excluded by the fact that the contract contained a provision for the keeping and making available of certain required records only, as follows: "The Contractor shall maintain records of attendance, deportment, and

progress of veterans in training under this contract and shall make available such records and furnish such reports to the Veterans Administration at such intervals as may be mutually determined and as may be necessary and required by the Veterans Administration to administer the training of the veterans as required by law." This requiring of attendance, deportment and progress records to be kept and made available has, however, no relationship to the matter of the Administrator's general right under the statute to make certain that tools were not being charged for on an improper basis in the statements submitted to him by the school for payment. And we are unable to see any basis for holding that, because the contract required certain records to be kept for a special purpose in one phase of the contract relationship, it therefore should be regarded as having been mutually intended, or as necessarily legally operating, to cut off the Administrator's right in other matters within his jurisdiction to examine any records of the school which were not contractually required to be kept and made available. The Administrator's power to request the production of books and records in relation to an arising question, "upon any matter within the jurisdiction of the Administration," as an incident of his power to make investigations, does not depend legally upon whether such existing books and records as may be relevant to the investigation have been required to be kept and made available as a matter of contract obligation.

The final contention made is that the subpoena was unreasonable and also oppressive in the situation involved. Technical arguments of unreasonableness are directed against the language of the administrative subpoena, as lacking sufficient particularity in designation, not being definite enough as to time limitation, and having too broad a scope in being made to cover tuition fees and other matters not related to tool charges. The merit, if any, of these technical arguments we need not examine, for the obliga-

tion now resting upon appellants is no longer that of the language of the subpoena but that of the more restricted language of the compliance order, which has made a sufficient express specification of the records to be produced, of the relevance of their relationship to the investigation, and of the period required to be covered, so that the arguments directed against the subpoena are in any event without any possible basis of validity as to the order.

As to the argument that the subpoena was oppressive, because the Veterans' Administration had some time previously, before its receipt of the letter from the General Accounting Office, been permitted by the school to go over its records and thus already had the information which the investigation was designed to elicit, the record does not satisfactorily establish that this examination had resulted in a sufficient obtaining of such information so as to require the District Court to accept this as constituting the fact. Nor is there any more merit in the suggestion that the General Accounting Office evidently must have had the information which the Administrator is seeking to obtain, when it wrote the communication to the Administration raising the question of the overcharges, and that the information thus was available to the Administrator from this source, so that, on this basis also, no further examination of the school's records was necessary. That argument would only tend to imply that the fact of overcharges existed, as the letter of the General Accounting Office had suggested, and that the Administration had all the proof needed to confirm this fact. We do not believe that appellants intend or desire any such implication here.

On the record before us, as we have indicated, the District Court was entitled to view the situation as being one in which the Administrator was attempting to make a good-faith investigation of whether the question raised by the General Accounting Office, as to improper charges and payments for tools having been made, had or was without

a valid basis; in which the investigating and ascertaining of the facts in this respect constituted an investigation upon a "matter within the jurisdiction of the Administration"; in which the production of books, papers and records, as directed by the compliance order, was a relevant aid to the making of the investigation; and in which the compliance that appellants were ordered to make was neither legally unreasonable nor oppressive in the circumstances shown.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.